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No. 06-1688

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IN THE

Supreme Court of the United States

G. MARK JENKINS, M.D.,

Petitioner,

v.

METHODIST HOSPITALS OF DALLAS, INC.; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; AND KIM HOLLON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: September 5, 2007

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ARGUMENT IN REPLY

The Response makes scant effort to dispute the conflict between the decision below and this Court's decisions in *Reeves* and *Desert Palace*. It similarly makes little effort to deny the split between the Fifth Circuit and other circuits regarding *Reeves's* clear endorsement of indirect evidence of racial animus and its rejection of the stray comments doctrine. Instead, the Response seeks to raise a variety of factual issues that are wholly irrelevant in this Court, given the procedural posture of this case, which requires all evidence and inferences be viewed in the light most favorable to Petitioner. Even more fundamentally, they are irrelevant given that the Fifth Circuit not only did not rely on the factual disputes raised by Respondents, but in fact rejected them, instead ruling based on its erroneous legal conclusion that, because Dr. Barnett's racist conduct and comments were not made in the context of Dr. Jenkins's summary suspension, they did not constitute relevant evidence of animus and therefore could not be considered on summary judgment. Once the chaff of Respondents' irrelevant factual arguments is swept away, it remains the case that the Fifth Circuit is squarely at odds with this Court and other circuits on the questions presented. The Petition should either be granted or held for the similar question raised in No. 06-1221 (*Mendelson*), currently pending.

I. Factual Disputes Concerning Dr. Barnett.

The hospital disputes Dr. Jenkins's account of the facts, attempting to make two main points. First, it contests Petitioner's characterization of Dr. Barnett as a "bigot," not so much because the shocking things he has said and done do not permit this inference, but because "bigot" it is not a nice word. They are right about that. It is an awful word, describing an awful thing. But a man who has referred to blacks as "gun-toting, drug pushing spooks," told a black physician that he could "teach a monkey" to practice medicine the way he did, told Jenkins during his initial interview that he wouldn't

let him treat his dog, believes that minorities have no right to go to medical school, and insults and has falsely accused minority doctors (including Jenkins) in an effort to hound them out of the hospital is, quite simply, racist. *See* Pet. at 5-6, *citing* record. And this case concerns whether and under what circumstances an influential decision-maker's persistent pattern of racism and bigotry in the workplace is probative of animus. The Fifth Circuit has ruled broadly and categorically that the evidence of this, consisting of both racial remarks and mistreatment of other similarly situated minority individuals, is nonprobative of animus and cannot be considered because the remarks do not constitute direct evidence of his racial animus in his particular decision to go after Jenkins. This is the same mistake they made in *Reeves*, they have made it repeatedly, *see* cases cited Pet. at 15, making it clear that this Court's unanimous correction of their error *seven years ago* in *Reeves* did not sufficiently make the point.

Second, the hospital expends *11 pages* pretending that Dr. Barnett's conduct should not be attributed to the hospital – i.e., that he was not the hospital's agent – a defense that it has twice lost. Moreover absence of agency was not the basis for the decision below. Both lower courts concluded that Barnett's involvement was sufficient to warrant imputing his animus, if any, to the hospital, such that it was necessary to analyze the content of his remarks. The Fifth Circuit's review of the record led it to conclude that Barnett "was *obviously* in a position to influence the decision to suspend Dr. Jenkins," App. A7 (emphasis added), which it deemed sufficient. And there is widespread support among other courts of appeal for the agency test used below. *See Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir.2000); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C.Cir.1998); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir.1997); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136,

1141 (9th Cir. 2001). *But see Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir.2004) (en banc). And, of course, the hospital has not cross-petitioned to challenge the Fifth Circuit's test, in any event.

Moreover, their discussion of Barnett's role does little more than present the hospital's favorite evidence, spun liberally in its favor, while ignoring much of the evidence showing Barnett's pervasive influence and involvement in the decision to summarily suspend Jenkins. Under a proper application of the standard of review crediting all evidence and inferences in favor of the nonmovant (Dr. Jenkins), *see Reeves*, 530 U.S. at 150-151, the disputes raised by the hospital are no more than jury questions. They have no relevance to this petition which seeks review of a summary judgment granted on a different legal ground. As both courts below plainly recognized, the evidence of Barnett's role was ample to impute his conduct to the hospital or at least raise a disputed issue of fact on the point, and hence cannot be the basis for defending the grant of summary judgment below.[1]

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[1] The oddly fine distinction, not asserted below, that the Response seeks to draw between a "hospital manager" and someone like Barnett who manages a hospital department is immaterial in a doctor-discipline case. "[T]he staff is acting as an agent of [the hospital] during the peer review process and as such is indistinct from the hospital." *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702-703 (4th Cir. 1991) (*en banc*).

Also, the opposition identifies a mistake in the Petition concerning the timing of Dr. Fraga's tenure on the CMB. The error was inadvertent and is immaterial. Dr. Fraga's affidavit criticizes the CMB, including Dr. Barnett, for failing to properly investigate the accusations against Jenkins before summarily suspending him. Pl. App. at 644-645. While Fraga did not join the CMB until "shortly after Jenkins' privileges were summarily suspended," Jenkins suspension endured for seven months, during which the matter came up at subsequent CMB meetings. Fraga states that his views about CMB recklessness were formed "as a result of taking part in those [CMB] meetings and observing my colleagues, including Howard Chase, Kim Hollon, and Jack Barnett" *Id.* This is more than sufficient personal knowledge.

II. Hospital's Arguments About Remarks Are Unsound.

A. No waiver in the district court.

The hospital argues that by citing the four-part "stray remark" test in his brief to the district court, Dr. Jenkins waived his right to complain about it here. Nonsense. While he tried to meet the four-part test that the Fifth Circuit has long followed, he did so only in the section of his brief entitled "Direct evidence of racially based discrimination directed at Dr. Jenkins."[2] This is its proper (and *only* proper) role. The immediately following section of his brief, which is devoted to *indirect* evidence, cites *Reeves* repeatedly. At the summary judgment hearing, the district court stated that she was "not prepared on this record to conclude ... that the remarks that are the basis for the claim are stray and not racially related" and that "those require context before making a determination."[3] Thereafter Jenkins's counsel urged the court, if reluctant to conclude that the remarks were direct evidence of discrimination, to "draw an inference from the situation, the words, the reason why they say they did what they did."[4]

B. No distinction between excluding racial remarks and disregarding them as non-probative.

Dr. Jenkins's Petition notes that the Court is currently considering a very similar issue in *Sprint/United Management v. Mendelson*, 06-1221, a case in which the district court excluded at trial so-called "me too" testimony by five former employees who contended that, like Mendelson, they too

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[2] Brief in Support of Pl.'s Resp. to Defs.' MSJ at 32 (emphasis added).

[3] 8 Tr. at 106.

[4] 8 Tr. at 128, *et seq.*

were discriminated against on the basis of age.[5] The hospital tries to distinguish *Mendelson* by arguing that the Fifth Circuit did not *exclude* the evidence of Barnett's remarks, but merely disregarded it on the basis that it was not probative of animus. This is a distinction devoid of difference explained by the different procedural postures of the two cases. Whether a plaintiff's witnesses are precluded from testifying at trial because their situations are insufficiently similar to the plaintiff's to have relevance, or the plaintiff's summary-judgment affidavits from analogous witnesses are declared to have no probative value, the result is the same. So is the legal analysis performed by the district court. *See, e.g., Boyle v. Mannesmann Demag Corp.*, 1993 WL 113734 (6th Cir.) (unpublished) ("...we have held repeatedly that such [stray] remarks are irrelevant and unduly prejudicial. As such, they must be excluded."); *see also* FED. R. EVID. 402 ("Evidence which is not relevant is not admissible."), FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

The hospital also argues that Barnett's remarks should not count against it because, as his "character trait," they are inadmissible under FED.R.EVID. 404(A). The journal article it cites for this proposition, however, sides with Jenkins, calling it "well-settled law" that a defendant's prior discriminatory treatment of either a plaintiff or other employees is relevant and admissible to show that his action against the plaintiff

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[5] Jenkins's case is more compelling than *Mendelson*. In Jenkins, the other two minority doctors who claim to have been mistreated by the hospital blame Barnett himself or claim to have overheard Barnett say racist things, as does Jenkins. By contrast, in *Mendelson* many if not all of the "me too" witnesses were complaining of the comments or actions of supervisors other than the one whose animus allegedly affected Mendelson. *Mendelson*, 06-1221, Cert. Pet. at 4-5.

was motivated by animus.[6] The author believes this to be sound policy:

> Excluding propensity evidence in discrimination suits would therefore do more than drastically tip the scales in defendants' favor... It would literally preclude relief for many employees who have suffered discrimination under circumstances for which Congress clearly intended to provide redress.[7]

Whichever way this Court is inclined on this interesting issue, the Petition squarely presents it, and the controversy the article elucidates is a reason to grant, not to deny, the Petition.

C. Conflicts with *Reeves* and other circuits.

Reeves. The Petition explains that, in *Reeves*, this Court disapproved of the Fifth Circuit's rejection of all discriminatory remarks that "were not made in the direct context of [the plaintiff's] termination," *Reeves*, 530 U.S. at 152-153 *citing* 197 F.3d at 693 (5th Cir. 1999), as constituting a misapplication of the standard of review and impermissible usurpation of the jury function. 530 U.S. at 152-153. The test that the lower court applied, and this Court rejected, in *Reeves* is the same one that the Fifth Circuit invoked to throw out the evidence of Barnett's animus.[8] That the facts in *Reeves* are not precisely identical to those here is unimportant because the legal issues presented by the facts are the same in both cases.

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[6] "The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits," 114 Yale L.J. 1063, 1082 (2005).

[7] *Id.* The author suggests that Rule 404 should include an express employment-discrimination exception.

[8] The test used in both *Reeves* and *Jenkins* is from *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir.1996). *C.f. Reeves*, 197 F.3d at 692 n.15 *citing Brown*, 82 F.3d at 655 (5th Cir.1996), with *Jenkins*, 478 F.3d at 261-262 *citing Patel v. Midland Memorial Hosp.*, 298 F.3d 333, 343-344, *citing Rubinstein v. Adm'rs of Tulane Educ.Fund*, 218 F.3d 392, 400-01 (5th Cir.2000) *quoting Brown*, 82 F.3d at 655.

The hospital's argument justifies the decision below only in a world where clear and unanimous Supreme Court decisions are issued, not to be studied for what they teach about the law, but to be limited to their facts by the very appellate court that was previously reversed for making the virtually identical error. The federal courts would cease to function if such an approach were widely followed.

The hospital next describes Petitioner's legal argument incorrectly and then attacks the "straw man" of its own creation. It is *not* Petitioner's position that "any alleged discriminatory remark makes the case a jury case regardless of the circumstances of the remark and the challenged decision." Resp. at 19. Rather, Petitioner maintains that a pattern and practice of racism by a key decisionmaker involved in hospital personnel decisions generally (and in the plaintiff's specifically) is probative of racial animus even when indirect. The Fifth Circuit's decision below goes about as far as it is possible to go in the opposite direction by requiring courts to disregard *every* discriminatory remark that is not itself *direct* evidence of race-discrimination. By raising the relevance bar above the usual one of "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable..." FED. R. EVID. 401, the test the Fifth Circuit employs in this and other recent cases violates *Reeves*'s fundamental teaching "that trial courts should not 'treat discrimination differently from other ultimate questions of fact,'" 530 U.S. at 148 (internal citation omitted). This case well illustrates the distortions that can result from this arbitrary and categorical approach.

Other circuits. Post-*Reeves*, the Fifth Circuit stands alone in requiring that *all* discriminatory remarks that do not pass its four-part test for direct remark-based evidence be discarded as non-probative of racial animus. As reflected in the Petition, no other circuit uses this test, and four circuits – the Second, Seventh, Eighth, and the District of Columbia – have issued well-reasoned decisions rejecting such categorical ap-

proaches as untenable. *See* Pet. at 16-17. Most recently, see *Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111, 114-116 (2nd Cir. 2007) (disapproving of categorical "stray remark" approaches and holding that when supervisor's age-related remarks were considered in the context of all the evidence, they were legally sufficient to sustain an inference that he was motivated in part by age discrimination).

III. The Failure To Credit Jenkins with Favorable Inferences from His Prima-facie Case Warrants Review.

There is no credible dispute in this case that Dr. Jenkins was subject to disparate treatment. The courts below have never denied such disparity – they just failed to draw the required inferences therefrom. Respondents' suggestion that the AHC's recommendation to terminate privileges is "more severe" than summary suspension ignores not only contrary evidence and authority,[9] but misses Jenkins's central point: An ad hoc committee, by nature, recommends. Absent summary suspension, nonconsensual discipline cannot be imposed until after the full-blown fairness hearing, which is very difficult for the hospital to manipulate. Jenkins had nothing to fear from the truth. But Barnett and those in league with him invoked the one and only disciplinary device that could penalize him before there was a fair opportunity for him to learn of their manipulations and expose them.[10] When he had that opportunity, he was resoundingly cleared. App. D1-D3.

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[9] *See* Pet at. 3-4 citing authority; Pet. at 4-5 n.4-5; Pet. at 8 n.18-19 citing authority; and Pl.App. at 629.

[10] The Petition only scratches the surface on the manipulation ("mendacity") issue. The hospital executive who presented the hospital's case against Jenkins to the AHC (Defendant Haupert) not only vouched for the credibility of the four complaining cath-lab witnesses, he presented their testimony as though it were typical of cath-lab opinion. It was not, as the numerous cath-lab affidavits attest. Moreover, one of the four witnesses had called Jenkins a "nigger." Another is one whose promotion Jenkins had actively opposed and who later admitted that he "hated" Jenkins. The

The hospital does not claim that any cardiologist other than Jenkins has been disciplined or even peer-reviewed for hostile conduct.[11] That the hospital singled out only its black cardiologist to take the fall for the hostile environment in its cath lab permits, and possibly compels, an inference of disparate treatment. That the precise ethnicity of the other offending cardiologists is unknown is irrelevant. We know they are hospital cardiologists other than Jenkins and that they were not black. Jenkins is the second black cardiologist ever to work at the hospital and the first to work in the cath lab. There is neither evidence, nor assertion by the hospital, that *any* other cath-lab cardiologist during the relevant period was black.

The hospital's suggestion that because the committees involved in peer-reviewing Jenkins did not have precisely the same members as those who dealt with Drs. V and T and hence cannot be compared for purposes of disparate treatment was rejected by the court below. It is also inconsistent with clear precedent from this Court. *See McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 283 n.11 (1976) (the "similarly situated" inquiry does not require "precise equivalence" but only that *other* "employees involved in acts against (the employer) be of comparable seriousness") (internal citation omitted).

Finally, contrary to Respondents' suggestion, Dr. Jenkins does not criticize the practice of assuming that a party has

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third simply repeated her previous complaint against Jenkins, which *the hospital had already found* to be without merit. The fourth, an African-American who may have been asked to appear for that reason, later regretted his involvement and gave an affidavit attesting that Dr. Jenkins was "set up" because of his race.

[11] That is why *the hospital* introduced for comparative purposes the examples of Drs. T and V, two *noncardiologists*, with these words: "[Dr. Jenkins's] statement that no other doctors have been peer reviewed at MHD for *conduct similar to his* is incorrect: in the past five years two other doctors - one white and one Hispanic - have also been peer-reviewed for such problems." Reply Br. in Support of Defs.' MSJ, at 21-22.

proved one element, in order to reach another element that is more easily disposed of. The *McDonnell Douglas* framework, however, does not consist of independent substantive-law elements. Instead its burden-shifting algorithm consists of discrete analytical steps that must be followed in sequence precisely because they are *not* independent. Moreover, this would be a different case if the Fifth Circuit had, after assuming the existence of a prima facie case, then gone on to credit Jenkins with the favorable inferences from the disparate-treatment evidence that the standard of review entitles him to. But it did not do that, gave no plausible explanation for declining to, and explicitly disregarded all other circumstantial evidence as insufficiently direct. In doing so, it was in direct and inexplicable conflict with this Court's decisions in *Reeves* and *Desert Palace* and with the standard applied in other circuits.

IV. CONCLUSION

As the Petition well establishes, and Respondents barely dispute, the Fifth Circuit's stray comments doctrine applied in this case is in conflict with the decisions of this Court and many other circuits. That erroneous doctrine was the legal basis for the decision below and the primary basis for the Petition. The numerous factual and other defenses the hospital raises in its brief in opposition have nothing to do with the question presented, ignore the procedural posture of this case, and are not sound reasons for denying certiorari. This Court should therefore grant the Petition to correct the Fifth Circuit's rogue reliance on a legal doctrine that was rejected in *Reeves* and that prevents plaintiffs from putting on, and having considered, probative indirect evidence of racial animus. In the alternative, this Court should hold this case pending its decision in the comparable case of *Sprint/United Management v. Mendelson*, 06-1221, now before this Court for full review.

Respectfully submitted,

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